

MUNICIPAL PUBLIC UTILITY POWERS

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One of the principal purposes sought to be achieved through the adoption of article XVIII of the Ohio Constitution, in 1912, was to empower municipalities to acquire and operate public utilities free of any control or interference by the state legislature and thus at least partially satisfy the then existing popular demand that steps be taken to provide proper public utility services to metropolitan areas. The specific constitutional grants of power to municipalities to acquire and operate public utilities are contained in sections 4 and 6 of article XVIII.¹ Section 4 of article XVIII² authorizes any municipality to acquire, construct, own, lease and operate any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants. Section 6 of article XVIII³ authorizes any municipality owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants to sell the surplus service or product thereof to persons outside the corporate limits of the municipality.

In this article various decisions of the Supreme Court of Ohio will be examined for the purpose of (1) determining the scope of municipal power to acquire and operate public utilities; (2) the merits or demerits of such decisions; and (3) whether the stated aim of the drafters of article XVIII, to empower municipalities to own and operate public utilities without let or hindrance from the state legislature has been achieved.

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¹ Sections 5 and 12 of article XVIII also deal with municipal utilities but are not discussed in this article. Section 5 is concerned only with the procedure that must be followed in the initial acquisition or construction of municipal utilities and section 12 confers special bond issuing authority for financing public utilities.

² Ohio Const., art. XVIII, § 4. [Acquisition of public utility; contract for service; condemnation.] Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and any contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility. (Adopted September 3, 1912.)

³ Ohio Const., art. XVIII, § 6. [Sale of Surplus.] "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality." (Adopted September 3, 1912.)

GENERAL CONSIDERATIONS

Historical Background

In reviewing the decisions dealing with sections 4 and 6 of article XVIII it is helpful to have in mind the historical background against which article XVIII was drafted and adopted.

Under the constitution of 1802, municipal corporations were generally incorporated pursuant to special acts of the legislature granting charters which established the form of government for, and enumerated the substantive powers of the municipality chartered. This method of fixing the form of government of municipalities and granting substantive powers proved so unsatisfactory that a provision was written into the constitution of 1851 prohibiting the granting of corporate power by special act of the legislature.⁴ At the same time, another provision requiring the legislature to provide for the organization of cities and incorporated villages by general laws was adopted.⁵ As cities grew and became more numerous, the need for additional municipal administrative agencies and broader substantive powers for the larger municipalities became apparent. Since the constitution prohibited special legislation granting corporate powers, the necessary changes in the form of government and increase in substantive powers could not be effected by special legislation and so resort was had to an elaborate system of dividing cities into classes and grades, so that eventually each of the twelve largest cities of the state was in a class and grade of its own, thus enabling the legislature to pass special laws for the government of any one of these cities under the guise of general legislation. This circumvention of the constitution of 1851 was finally brought to a halt by a supreme court decision⁶ which held invalid the appointment and election of all municipal officers of the twelve major cities of the state, because they had been made pursuant to what the court found to be special acts of the legislature.

Faced with the prospect of these major municipalities being without legal government, the General Assembly, at a special session called by the governor for that purpose, repealed all of the constitutionally obnoxious municipal statutes and enacted the Ohio Municipal Code of 1902, which is basically the same municipal code that is in effect today. This Code, because it was enacted prior to the adoption of article XVIII necessarily not only granted to municipalities all

⁴ Ohio Const. art. XIII, § 1. [Corporate powers.] "The general assembly shall pass no special act conferring corporate powers."

⁵ Ohio Const. art. XIII, § 6. [Organization of cities, etc.] "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

⁶ State *ex rel.* Knisley v. Jones, 66 Ohio St. 453, 64 N.E. 424 (1902).

their substantive powers, including the power to acquire and operate public utilities, but also in detail prescribed the village and city forms of government.

The fact that the same form of government and substantive powers will not suffice for both a city of 5,000 population and a city of 100,000 or more population, became more and more apparent with each year of operation under the Municipal Code of 1902. Dissatisfaction with the Municipal Code of 1902 was especially strong in the larger cities which found it difficult to operate efficiently and impossible to provide many necessary municipal services because of the limited authority granted by the 1902 Municipal Code. The citizens of the larger cities were, at the same time, vehemently complaining of the then current practices of privately owned public utilities.

Constitutional Convention Debates

It was with this historical background in mind that the convention of 1912 undertook the drafting of article XVIII. Professor Knight, who explained the proposed article XVIII to the constitutional convention, stated that the three chief purposes sought to be accomplished in drafting the amendment were (1) to empower each municipality to adopt a form of government of its own choosing; (2) to give each municipality authority to carry out municipal functions without statutory authorization; and (3) to facilitate municipal ownership and operation of public utilities.

The first objective of the amendment is, according to Professor Knight, accomplished by sections 2 and 7 of article XVIII which empower the electors of a municipality to establish the form of government for the municipality by adopting a Charter pursuant to section 7 of article XVIII, or by adopting one of the optional forms of government⁷ established by the state legislature pursuant to section 2 of article XVIII, or by inaction requiring the municipality to use the general statutory form of city government or village government, as the case may be, prescribed by the state legislature pursuant to section 2 of article XVIII. The second objective of the drafters of article XVIII was accomplished chiefly through section 3 of article XVIII which confers upon municipalities all powers of local self-government. The third objective is achieved through sections 4, 6 and 12 of article XVIII.

Professor Knight pointed out to the constitutional convention that it would not be necessary to change the Municipal Code of 1902, if article XVIII was adopted, because municipalities that did not adopt a charter or an optional form of government would continue

⁷ See, Ohio Rev. Code, c. 705.

to operate under the applicable general statutory form of government and that the various statutes, including those dealing with municipally owned public utilities, granting various substantive powers, even though they would become meaningless, would not have to be repealed.

It is axiomatic that constitutional grants of authority cannot be limited or curtailed by the state legislature except as, and to the extent, authorized by the constitution. The framers of article XVIII were, of course, aware of this fundamental legal concept and, therefore, in drafting said article, specifically authorized the state legislature to limit such of the constitutional powers granted to municipalities therein as they thought should be subject to legislative control. Thus in section 3 of article XVIII the power of municipalities to adopt police regulations is made subject to the limitation that such regulations cannot be in conflict with state police regulations and in section 13 the legislature is empowered to establish over-all limitations on the authority of municipalities to incur debts and to levy taxes and assessments. In construing this article of the constitution the "expressio unius exclusio alterius" rule applies and the power of the legislature to restrict the exercise by municipalities of the powers therein granted must be restricted to those powers of limitation expressly conferred upon the legislature by the provisions of article XVIII or any other applicable constitutional provision.⁸

ACQUISITION OF UTILITIES

Statutory Limitations

Just three years after the adoption of article XVIII the supreme court considered the question of whether the state legislature could, by statute, limit the right of a municipality to acquire a public utility.⁹ General Code section 3990, which was in effect at that time, provided that no village in which there was an existing gas or electric works could proceed to construct a new gas or electric works without first offering to buy the existing works. The Village of Orrville undertook to construct its own gas and electric works without first offering to buy the electric plant of the Massillon Electric & Gas Co. which was located in and served the village. In answer to the contention that the village could not proceed to construct a new electrical works without complying with the provisions of section 3990 the court pointed out that section 4 of article XVIII confers upon municipalities plenary power to acquire and construct public utilities and that to the extent General Code section 3990 is inconsistent with that plenary grant of power it is unconstitutional.

⁸ *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913).

⁹ *Dravo-Doyle Co. v. Orrville*, 93 Ohio St. 236, 112 N.E. 503 (1915).

In *State ex rel. Toledo v. Weiler*,¹⁰ the right of the state legislature to indirectly limit or curtail the power of a municipality to acquire a public utility by prohibiting municipalities from using general obligation bonds as a means of financing the acquisition or construction of a public utility was argued. The city of Toledo desiring to acquire a transportation system for the benefit of the residents of that city undertook to finance the acquisition thereof by the issuance of general obligation bonds payable from real estate taxes. The statutes in effect at that time governing the issuance of general obligation bonds by municipalities provided that such bonds could be issued for certain specified purposes and no others. The acquisition of a transportation system was not one of the specified purposes. Respondents in this case were able to point to the provisions of section 6 of article XIII and section 13 of article XVIII which specifically empower the state legislature to limit the power of municipalities to levy taxes and incur debts. It was conceded that the bonds proposed to be issued by Toledo involved both the incurring of a debt and the levy of taxes within the meaning of these constitutional provisions. Although not conceded it was obvious that if municipalities had no authority to issue general obligation bonds for the acquisition of a public utility the provisions of section 4 of article XVIII would be vitiated.

The court approached the question from the standpoint that the provisions of section 4 of article XVIII are self-executing and confer upon municipalities plenary power to acquire public utilities, which power necessarily includes the authority to do all things that are essential to the acquisition of a utility. The court found that the issuance of general obligation bonds and the levy of taxes incident thereto was essential to the acquisition of a public utility and was, therefore, included in the power conferred by section 4 of article XVIII. Judge Matthias, speaking for the court, referred to the discussions in the constitutional convention with respect to the financing of the acquisition of public utilities and said:

As there suggested, the purpose of these constitutional amendments was to afford municipalities of the state the opportunity, when they should choose to do so, to own and operate their public utilities, and to confer upon them expressly and directly full power and complete authority to accomplish that purpose, the only reservation being that they must recognize and respect the limitations of tax levies and indebtedness for local purposes prescribed by law. But this reservation does not authorize the legislature to annul or curtail the powers expressly granted by the Constitution. It may limit the levy of taxes and the extent of bonded indebtedness for

¹⁰ 101 Ohio St. 123, 128 N.E. 88 (1920).

local purposes, but it may not, either by action or inaction, preclude the exercise of power expressly conferred by the Constitution, or deny the use of its revenues from taxation or its general credit for any purpose authorized by a constitutional provision or for any purpose within the powers of local self-government thereby conferred. It was not contemplated that any grant of power by the legislature was essential, nor that it should be permitted to deny or limit the purpose, but only prescribe the limitation of taxation and bonded indebtedness for all local purposes.

This is undoubtedly one of the best pronouncements of the supreme court with respect to the meaning of the provisions of section 6 of article XIII and section 13 of article XVIII empowering the state legislature to limit the authority of municipalities to levy taxes and incur debts and it unequivocally states that these provisions of the constitution do not empower the state legislature to withdraw from municipalities or to annul any of the powers granted by sections 4 or 6 of article XVIII or any of the powers of local self-government conferred by section 3 of article XVIII, but only empowers the state legislature to prescribe over-all municipal debt and tax limitations for the purpose of insuring the financial solvency of municipalities. Unfortunately *Weiler* has not been followed uniformly by the courts; yet any other interpretation of these constitutional provisions results in vitiating or completely nullifying article XVIII. Section 4 of article XVIII confers upon municipalities the power to acquire and operate public utilities. Section 3 confers upon municipalities all powers of local self-government including the power of eminent domain, the power to contract, the power to levy taxes and the power to provide any improvements and services for the benefit of the people of the municipality which serve a proper public purpose.¹¹ The construction of any public improvement and the furnishing of public services necessarily requires the expenditure of money which can be obtained, in the main, only through the levy of taxes or the incurring of debt, or both. If the state legislature is empowered by section 6 of article XIII and section 13 of article XVIII, as was contended unsuccessfully in *Weiler*, to say to municipalities, "you may only levy taxes and incur debts for those municipal public improvements or services specified by statute and no others," article XVIII is rendered meaningless and municipalities have no constitutional home rule powers with respect to acquisition and operation of public utilities or any other municipal functions.

It is axiomatic that constitutional provisions must be read in para

¹¹ State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953); State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951); State *ex rel.* Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

materia and that one constitutional provision cannot be construed as repealing or nullifying another constitutional provision unless no other construction is possible. This is especially true when the constitutional provisions to be construed have all been adopted at the same time as part of one article of the constitution as were sections 3, 4 and 13 of article XVIII. The *Weiler* decision gives full force and effect to all the provisions of article XVIII and is, therefore, consonant with all recognized rules of constitutional and statutory interpretation. Any other construction of section 13 of article XVIII would emasculate or annul the provisions of sections 3, 4 and 6 of article XVIII and could not be justified as a matter of law or of common sense.

It is not intended here to contend that Ohio municipalities are in any sense independent of the State of Ohio but it is contended that Ohio municipalities are in many matters empowered by the constitution to act independently of the state legislature. It is conceded that Ohio municipalities are, in all matters, subject to the control of the state. This is not, however, equivalent to saying that municipalities are subject to the state legislature. The legislature is not the state. It is only one of the state agencies created and empowered by the constitution. The people, the source of all state power, speak through the constitution and the legislature can operate only in the sphere assigned it by the constitution. The people of Ohio, through their constitution, have given municipalities the authority to acquire and operate public utilities subject only to those limitations set forth in the constitution and the state legislature can only limit such constitutional grant of power to the extent it is specifically, or by necessary implication, authorized to do so by the constitution.

The Use of Eminent Domain in Acquisition

The growth of air transportation has given rise to the very interesting and important legal question of whether a municipality desiring to construct an airport outside its corporate limits has the power to appropriate property already devoted to a public use. There is no question that an airport is a public utility within the meaning of section 4 of article XVIII,¹² and that section 4 confers upon municipalities the power to acquire by eminent domain property needed for a municipal public utility even though the property is located outside the municipal corporate limits.¹³

¹² *Toledo v. Jenkins*, 143 Ohio St. 141, 54 N.E.2d 656 (1944); *Chandler v. Jackson*, 121 Ohio St. 186, 167 N.E. 396 (1929).

¹³ *Bruestle v. Rich*, *supra* note 11, at page 32, 101 N.E.2d at 789, where the court says, after determining that section 3 of article XVIII confers upon municipalities the power of eminent domain, "Any doubt as to this is completely dispelled by the provisions of Sections 4 and 10 of Article XVIII, each of which purports to extend the

This question is presently being litigated by the City of Cincinnati and the Village of Blue Ash in a case in which Cincinnati is attempting to appropriate for airport purposes an easement for street purposes belonging to the Village of Blue Ash. Here we have a novel situation where a city, having an unlimited grant of constitutional power to acquire property outside its corporate limits for airport purposes, is attempting to appropriate from a village, which also has an unlimited constitutional power of eminent domain, property presently devoted to street purposes. It is the city's contention that under such circumstances the court must examine the facts and determine which public need is paramount in the particular case and that paramount public need controls. The village, on the other hand, argues that property devoted to an existing public use cannot be acquired for another public use irrespective of the question of how unimportant the existing public use is to the public and how important to the public welfare the proposed public use may be. There is a series of Ohio cases which hold that where the power of eminent domain has been delegated by the General Assembly to a corporation or political subdivision such delegated power of eminent domain does not include the right to take property already devoted to a public use, where such taking would destroy the prior public use, unless the right to take such property is expressly or implicitly conferred. This rule of law is not applicable, however, to a case where a city is not relying on any delegated power of eminent domain but instead a direct grant of the power of eminent domain from the people of the state of Ohio through the constitution which confers upon the city the same power of eminent domain that is possessed by the state itself and which cannot be limited by the state legislature.¹⁴

As previously noted, in *Weiler* the supreme court held that section 4 of article XVIII confers upon a municipality all the power and authority necessary to acquire or construct a public utility either inside or outside its corporate limits as long as the service of such utility is to be used by the people of the municipality. Because of the high landing and takeoff speeds of modern aircraft, modern airports must be large enough to provide runways in excess of 8,000 feet in length. Because of the fact that most cities that require the services of airports are densely populated, it is necessary, from an economic point of view, to locate such airports in the areas outside the city which are sparsely populated. In the sparsely populated areas it is impossible, because of the length of the runways required, to

authority of a municipality to exercise the power of eminent domain beyond such authority as would be included within the foregoing words of Section 3 of that Article."

¹⁴ *Bruestle v. Rich*, *supra* note 11.

construct an airport without acquiring in some manner, either by appropriation or vacation, parts of existing street systems. If the streets cannot be vacated then they must be appropriated or there can be no airport. It might be said, with respect to such a case, that the city should locate its airport in an unincorporated area. The facts of the Cincinnati case are, and this would probably be true of many other cases, that the area in which the airport is located was unincorporated at the time the city began the airport project and that the incorporation was effected primarily for the purpose of blocking the airport.

Since practically all, if not all, commercial airports in the state of Ohio are municipally owned, the importance of this legal question in the future of air transportation in Ohio cannot be understated. The problem cannot be resolved by an act of the state legislature because the legislature cannot confer upon municipalities broader powers of eminent domain for the acquisition of property for airports than is already conferred by section 4 of article XVIII, nor can the legislature limit or curtail the village's power of eminent domain to appropriate property for street purposes conferred by section 3 of article XVIII.¹⁵ This is a question pure and simple of a conflict between the exercise of constitutional powers by two different municipalities and must be resolved by the courts construing and properly applying the provisions of the constitution.

If it is true that laws, whether constitutional or statutory, should be interpreted if at all possible to produce results which are reasonable, the city should prevail in its efforts to appropriate street right-of-way if it can show that the public need for the airport is greater than the public need for the street right-of-way in question.¹⁶ In order to demonstrate that the use for airport purposes of the right-of-way in question is paramount to the street use it should be sufficient to show that an airport is needed, that this is a logical place to put the airport and that the street right-of-way in question can be abandoned or relocated without seriously interfering with the public's need for an adequate street system. The question of whether, generally speaking, the need for airports is paramount to that for streets from the point of view of public necessity or accommodation is not a factor.

Courts outside the state of Ohio have passed upon this question and have applied what might be called the rule of reason or the rule of paramount necessity. In these cases the courts recognize the general

¹⁵ *Ibid.*

¹⁶ There is no question with respect to the rights of abutting property owners because their property can be appropriated for airport purposes and in the instant case it has already been appropriated and is owned by the city.

proposition that normally property already devoted to a public use cannot be acquired for another public use if the new use will destroy the old. However, the courts recognized that there are cases where relatively unimportant portions of streets would have to be acquired for airports or some other public purpose for which there was a great public need and that under such circumstances it would be judicial nonsense to hold, in the absence of any constitutional prohibition or valid statutory prohibition, that the existing public use could not be appropriated for a new public use for which there was a greater public need or demand. Based upon this reasoning these courts uphold the right of a municipality to appropriate portions of streets for airport purposes in those cases where it could be demonstrated that the airport would serve the general public and that the abandonment or relocation of the street in question would involve merely a minor inconvenience to the general motoring public even though it might entail a major inconvenience to some small portion of the public.¹⁷

OPERATION OF UTILITIES

The right of the legislature to directly limit or restrict the operation of municipally owned public utilities is governed by the same principles of law that have been heretofore discussed in connection with the acquisition of public utilities by municipalities. The fact, however, that the state legislature has no right to directly restrict or limit the power of municipalities to operate utilities does not mean that municipally owned utilities are free of all regulation. A municipal utility, with respect to consumers within the municipality or within areas having contracts for the utility's service with the municipality, has the same common law duty of rendering service on a reasonable and non-discriminatory basis as have privately owned utilities. Furthermore, the state, in the exercise of its police power, can impose restrictions and limitations upon customers of municipal utilities, as citizens of the state, and thus indirectly affect the operation of municipal utilities.

Statutory Restrictions

In a long series of decisions the supreme court has struck down all of the various statutory provisions purporting to regulate or limit the power of a municipality to operate public utilities. In *Camp Lodge Association*¹⁸ the provisions of former General Code section 3963 requiring municipalities to furnish free water to certain eleemosynary institutions was declared invalid. A provision of the same section

¹⁷ City and County of Denver v. Board of County Com., 156 P.2d 101, 113 Colo. 150 (1945); Howard v. Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

¹⁸ 102 Ohio St. 207, 131 N.E. 349 (1921).

requiring municipalities to furnish water free of charge to public schools within the municipality was struck down in a later supreme court case.¹⁹ The *Pfau* case²⁰ upheld the validity of an ordinance of the City of Cincinnati making a property owner responsible for water bills of his tenants despite the contention that the ordinance was inconsistent with certain statutory provisions. In *Schwenck*²¹ the supreme court upheld the right of a municipality to furnish free municipal electric plant service to agencies of the city notwithstanding the language of certain statutory provisions which could have been construed as prohibiting such practice. The provision of Revised Code section 743.13 requiring municipalities furnishing water services to consumers outside the municipality to observe a 10% maximum rate differential between consumers inside and outside the municipality was nullified in *McCann*.²²

The question of whether the state legislature can make the rates charged by municipal utilities subject to regulation by the Public Utilities Commission of Ohio has, of course, never been considered by the courts since no legislation has ever been enacted purporting to grant this authority to the Public Utilities Commission. It would seem clear, from the cases heretofore cited and from an analysis of the basic principles upon which government regulation of public utilities is predicated, that the General Assembly would have no authority to subject municipal utilities to rate regulation by the Public Utilities Commission or any other state regulatory body.

Ordinarily public utilities cannot operate without special grants of authority from government. Most utilities require grants from government of the power of eminent domain and the right to use public streets for utility installations. As a condition to the grant of these and other privileges the governmental body granting them retains the right to control the utility in order to prevent any abuse by the utility of the granted powers. Thus the state legislature can, in granting certain powers to a privately owned public utility, say to the utility that the powers are granted subject to the condition that the utility operate in conformity with regulations fixed by the legislature. Municipal utilities, however, do not derive their power to operate from the state legislature but instead obtain such authority directly from the constitution. What the state legislature grants it can grant on conditions. What the constitution grants cannot be limited or regulated by the state legislature unless, and only to the extent, legis-

¹⁹ Board of Ed. v. Columbus, 118 Ohio St. 295, 160 N.E. 902 (1928).

²⁰ 142 Ohio St. 101, 50 N.E.2d 172 (1943).

²¹ 166 Ohio St. 415, 143 N.E.2d 586 (1957).

²² 167 Ohio St. 313, 148 N.E.2d 221 (1958).

lative regulation is authorized by the constitution. As previously pointed out, there is nothing said in the constitution to indicate that the powers therein granted to municipalities to operate utilities are subject to regulation or limitation by the state legislature. Hence, it would appear that the General Assembly has no power to limit or restrict, by regulation or otherwise, the power and authority of a municipality to operate a public utility for the purpose of supplying the product thereof to such municipality and its citizens, or selling and delivering to others the surplus product or service of such utility, pursuant to the provisions of sections 4 and 6 of article XVIII.

There is language in some opinions of the supreme court²³ which seems to say that the General Assembly may merely regulate but not restrict or limit the power of municipalities to operate public utilities. However, as was pointed out by Judge Taft in *McCann*,²⁴ every regulation limits or restricts something and "if a so-called mere statutory regulation of the General Assembly limits or restricts a power conferred by section 4 or section 6 of Article XVIII, it can be no more valid or effective than a direct statutory prohibition or limitation on such constitutionally granted power."

Other Restrictions

Municipalities are created, at least in part, for the benefit of and to serve the residents thereof and the owners of property therein. The residents of a municipality have constitutional rights which obviously cannot be ignored by a municipality in the operation of a public utility. Among these rights are the right to have municipal utilities furnish their services or products to the inhabitants of the municipality on proper terms and conditions, without discrimination and at rates which are reasonable.²⁵ Although these constitutional rights of the inhabitants of municipalities cannot be protected by legislative regulation they can be and are protected by the judicial branch of the state in the same manner as other constitutional rights are protected.

²³ *City of Akron v. Public Utilities Com.*, 149 Ohio St. 347, 78 N.E.2d 890 (1948); *Western Reserve Steel Co. v. Village of Cuyahoga Heights*, 118 Ohio St. 544, 161 N.E. 900 (1928); *Butler v. Karb*, 96 Ohio St. 472, 117 N.E. 953 (1917).

²⁴ 167 Ohio St. at 316, 148 N.E.2d at 224.

²⁵ *Western Reserve Steel Co. v. Cuyahoga Heights*, *supra* note 23; *Butler v. Karb*, *supra* note 23. In considering this case it must be remembered that it was decided at a time when the supreme court was of the opinion that it was necessary for a municipality, in order to gain the benefits of the home rule amendment, to adopt a charter. In a later decision, *Perrysburg v. Ridgeway*, 108 Ohio St. 245, 140 N.E. 595 (1923), the supreme court held that the adoption of a charter is not a prerequisite to a municipality's exercising the substantive powers of home rule conferred by article XVIII.

Although a municipality has an obligation and duty to furnish the service or products of its municipal utilities to consumers within the municipality on a fair and impartial basis, it has no obligation, in the absence of contract, to furnish the services or products of its municipal utilities to consumers outside the municipality. Since the municipality has no obligation, in the absence of contract, to furnish the products of its municipal utilities to consumers outside the municipality, such services or products can be furnished on any basis the municipality may select.

In *Indian Hill Acres*,²⁶ the owner of property outside the corporate limits of a city sought to require the city to furnish water to such property. The city for many years had furnished water to the unincorporated areas of the county pursuant to a contract which terminated in 1946. Thereafter, the city determined that it would continue to furnish water to existing consumers in the unincorporated area of the county but would not furnish water to any new consumers unless the consumers agreed to annex to the city. Indian Hill Acres, Inc., had subdivided its property and installed therein, under city inspection and supervision, water mains which it desired to connect to water mains in the county carrying city water. The city refused to permit the company's water mains to be connected to such county water mains because the company refused to agree to annex its property to the city.²⁷ The company thereupon brought suit to require the city to permit the connection of the company mains to mains carrying city water. The court of appeals held for the company on the theory that once a municipality undertakes to serve water to a particular area it has the duty to continue to furnish such water not only to existing consumers in the area but also new consumers in the area on a fair and impartial basis. The supreme court reversed, holding that in the absence of a contract a municipality has no duty to furnish water to consumers outside its corporate limits. In answer to the argument that the city's policy deprived the residents of the area of their right to determine whether or not they wished to be annexed to the city, the court merely pointed out that the city's policy did not compel annexation and the difficulties entailed in obtaining some other source of water supply constituted merely an economic problem that might influence the residents of the area with respect to the desirability of annexing to the city.

²⁶ 149 Ohio St. 461, 79 N.E.2d 319 (1948).

²⁷ It is interesting to note the facts of this case bring it squarely within Ohio Rev. Code, § 743.13 which provides that when a person at his own expense has laid and extended water mains beyond the limits of the municipal corporation, under the supervision and inspection of the municipal corporation the municipality shall furnish water to the property owners served by such mains.

In subsequent cases the right of a municipality to discontinue water service to a consumer who had agreed to and then refused to co-operate in effecting the annexation of his property to the municipality was upheld on the basis that in the absence of a contract a municipality has no duty to furnish water service to consumers outside its corporate limits.²⁸

Where a municipality enters into a contract with another political subdivision pursuant to which the municipality is to furnish the product or service of its utility to the inhabitants of the other political subdivision, the municipality is, of course, bound by the provisions of the contract. In *Western Reserve Steel Co.*,²⁹ the supreme court went a step further and announced the principle of law that where a municipality contracts to supply water to the public of another municipality, it dedicates itself to the service of the public of such other municipality, and while it may limit, by contract, the scope and extent of its duty to the municipality as such, it cannot, while enjoying the privilege and immunities of a public utility, by such contract absolve itself from the duties toward such public that are cast upon it by law by reason of such dedication. In that case a city contracted with a village to furnish the village with water. The contract provided, that in the event of any delinquent accounts within the village, the village would pay such amounts to the city and that upon request of the village the city would terminate water services to any premises within the village to which water had been furnished but not paid for. A consumer of water within the village went bankrupt owing the city for water furnished. The village paid the city the amount due and at the direction of the village the city discontinued water service to the premises. The property was then sold to the steel company by the trustee in bankruptcy and the city refused to furnish water thereto unless the delinquent water bill was paid to the village. The court held that the village had no right to make the steel company responsible for the debt of the former bankrupt owner of the premises in question and ordered the village and city to furnish water to the company.³⁰

Although the result reached in this case was undoubtedly correct it seems that a better approach to the problem would have been that the village, in contracting for a water supply for the inhabitants thereof, owed an obligation to the consumers of the village not to

²⁸ *Merkel v. Kellogg, C. P. Hamilton Co., Ohio*, Case No. A-115602, Ct. App. Case No. 7243, *cert. denied*, Supreme Court of Ohio Case No. 32292.

²⁹ 118 Ohio St. 544, 161 N.E. 920 (1928).

³⁰ It was not contended and could not have been contended in this case that the water bill was a lien on the real estate in question.

enter into any contract which would be discriminatory with respect to any inhabitants of the village. The provisions of the contract in question would be invalid, not by reason of any obligation of the city to consumers within the village, but by reason of the obligation of the village not to enter into any contract which would discriminate against any inhabitants of the village. The court, of necessity, recognized that the provision of the contract in question was not for the benefit of the city but solely for the benefit of the village and violated the village's obligation not to discriminate among its own inhabitants. The invalidity of this provision of the contract could not, of course, give the city any right to terminate the agreement because it did not affect any contract rights of the city and, therefore, the order requiring the city to furnish water to the company was proper.

This case does not hold, and cannot be construed as holding, in spite of some broad language in the opinion and syllabus, that a municipality contracting to furnish water service to another municipality must furnish the inhabitants of such other municipality water under the same terms and conditions that it furnishes water to its own inhabitants. It merely holds that where a municipality contracts to furnish water to another political subdivision it must furnish such service to all consumers within such other political subdivision on the same basis. If, for example, the court were to hold that the rates charged by a city pursuant to a contract to furnish water to consumers within another political subdivision were too high and thus invalid, the whole contract would be ineffective and the obligation of the city to furnish water would be terminated. This result would necessarily follow from the application of basic principals of law governing contracts.

USE OF REVENUES

The one field of municipal public utility law in which the decisions of the courts have been adverse to the operating municipalities is that of the use of utility revenues for general municipal purposes. In a series of cases beginning with *Roettinger*,³¹ the supreme court has uniformly upheld the right of the state legislature to prohibit the use of surplus public utility revenues for general municipal operating purposes. The thesis upon which the court has sustained such statutes is that a charge for a municipal utility product or service in excess of the amount necessary to cover the cost of the product or service amounts to a tax that can be limited or prohibited by the state legislature under the provisions of section 13 of article XVIII and section 6

³¹ 105 Ohio St. 145, 137 N.E. 6 (1922); *Hartwick Realty Co. v. City of Cleveland*, 128 Ohio St. 583, 192 N.E. 880 (1934); *City of Lakewood v. Rees*, 132 Ohio St. 399, 8 N.E.2d 250 (1937).

of article XIII of the constitution. This proposition is unsupportable either as a matter of law or common sense.

In *Roettinger* the court found that the statute now designated Revised Code section 743.05 prohibits a municipality from using water works revenues for other than water works purposes. In considering the merits rather than the efficacy, which seemingly is unimpaired, of *Roettinger* it must be kept in mind that the court was considering one of a series of statutes passed by the state legislature prior to the adoption of the home rule amendment which were, at the time of their passage, admittedly the only authority for a municipality to operate a water works and which, because of the dependency of municipalities upon the largess of the state legislature at the time of the enactment of such statutes, could limit and curtail municipal public utilities operations in any manner the state legislature deemed appropriate.

The statute considered in *Roettinger* did not specifically prohibit the use of water works revenues for general municipal purposes. To find such prohibition in the statute required interpretation and search for legislative intent. Judge Marshall, speaking for the court, said:

It is urged on the one hand that the statute does not expressly forbid the use of surplus for general municipal purposes and that in the absence of such prohibition the power must be held to exist. It is urged on the other hand that the city has only such power over rates and charges as the legislature has expressly conferred, and that the construction of the Act must be the same as if the word "only" was inserted therein. The latter rule of construction must be adopted, otherwise the entire sentence is rendered meaningless. Unless the section holds the city strictly to the purposes therein named, and if the city authorities may add any other uses and purpose in expending the surplus, the question must arise whether any limitations are legally imposed upon the city in the employment of such surplus. Such a construction must necessarily lead to absurd results. Municipalities get their authority for levying taxes and raising revenues from the legislature, and the legislature must be held to have the power to place proper limitations thereon.

In answer to the contention that the statute in question has been superseded or nullified by the adoption of article XVIII, Judge Marshall opined:

It is important at this point to inquire into the nature of rates and charges which are in excess of an amount sufficient to pay the cost of the operation of the water works and to make provision for repairs, renewals, extensions, new construction, and interest and principal of debt arising out of the construction. While it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classified as taxes, it does not follow that such excessive amounts would not be classi-

fied as taxes. . . . It is apparent that any effort upon the part of any municipality to deliberately impose rates and charges for water supply, not for the purpose of covering the cost of furnishing and supplying the water, but for the purpose of making up a deficiency in general expenses of the municipality, and which cannot be met within the limitations of taxation otherwise provided, is to that extent an effort to levy taxes, and, to the same extent, an effort to evade the statutory and constitutional limitations upon that subject. . . . It seems very clear on the other hand that by virtue of the provisions of Article XII and Section 13 of Article XVIII, the legislature has power to place limitations thereon; and the provisions of Section 3959 are in the nature of such limitations.

Referring then to the power conferred upon municipalities by sections 4 and 6 of article XVIII of the constitution and admitting that the state legislature has no authority to pass any law interfering with or burdening municipal operation of public utilities and stating that the court did not intend to in any way alter, amend or detract from either the letter or the spirit of the home rule provisions of the constitution, Judge Marshall averred:

If it has been intended by the people that municipalities should have full control over the matter of rates and charges and if it had been believed by the people at the time the home rule provisions were framed and adopted that control over rates and charges were necessary to the complete acquisition, construction, owning, leasing and operating of a public utility, it would have been a very simple matter to have added such provisions. May it not be assumed that having failed to do so, the people foresaw the very thing which has actually happened? It is not difficult to see at this time that to give municipalities full control over rates and charges for a public utility municipally owned would cause all limitations upon taxation to become entirely meaningless and futile.

Conceding Chief Justice Marshall's stature as an Ohio jurist, it is submitted that his opinion in *Roettinger* and the decision of the court in that case are devoid of merit.

In the first place it was only by a strained construction of the statute in question that the court could find therein a prohibition against municipal use of water works utility revenues for general municipal purposes. Such a construction of the statute is difficult to justify especially in view of the fact that the statute when enacted, prior to 1912, was intended to be and was a grant of authority and not a limitation on a pre-existing authority; and in view of the further fact that the court's interpretation creates a statutory limitation upon a constitutional power conferred upon municipalities after the passage of the statute. It is difficult to understand how the court in construing this statute could find a legislative intent to limit a future grant of constitutional power to municipalities even if, as was not the case

with respect to the statute under consideration, the legislature had the constitutional power to limit the subsequent constitutional grant of power.

Secondly, how could the court say that municipalities "derive their authority for levying taxes and raising revenues from the legislature" in view of the court's earlier decision in *Carrel* and later decisions in other cases specifically holding that municipalities derive their authority to levy taxes from section 3 of article XVIII.³²

Thirdly, how can it be contended that excessive rates for utility products or services are taxes? Admittedly municipalities in the operation of public utilities operate in a proprietary capacity in much the same manner as privately owned public utilities except with respect to legislative regulation. Furthermore, it must be conceded that the establishment of public utility rates is not a legislative function, otherwise privately owned public utilities could not establish such rates. Furthermore, under the general forms of government provided by statute for cities and villages municipal public utility rates are not even fixed by the legislative authority of the city or village but by administrative authorities, which fact proves that the members of the state legislature, at that time, were of the opinion that the establishment of public utility rates is not a legislative function.³³ Unquestionably the levy of taxes is a legislative function and taxes cannot be imposed by an administrative officer. How then, can it be argued that excessive public utility rates imposed by municipal administrative officers are taxes any more than excessive public utility rates fixed by privately owned public utilities are taxes? If the rates charged by the municipal utility to consumers within the municipality are proper and a cash surplus is created by reason of higher rates charged to consumers outside the municipality, can it be contended that the higher rates charged to consumers outside the municipality are taxes? What justification, either in law or common sense, is there for Judge Marshall's position?

Fourthly, even Judge Marshall would not go so far as to specifically say that a statute prohibiting the use of a utility surplus for general municipal purposes was a limitation on the power of mu-

³² State *ex rel.* Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919). Also, see Clark v. Cincinnati, 163 Ohio St. 532, 127 N.E.2d 363 (1955); Angell v. Toledo, 153 Ohio St. 179, 91 N.E.2d 250 (1950); Marion Foundry Co. v. Landes, 112 Ohio St. 166, 147 N.E. 302 (1925); Globe Security and Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922).

³³ Ohio Rev. Code, §§ 743.04 and 735.29 which confer upon administrative officers of cities and villages the right to fix public utility rates. See also Ohio Rev. Code, §§ 731.01 and 731.09 which state that the legislative authority of cities and villages are vested in the city and village councils.

municipalities to levy taxes within the meaning of the provisions of section 13 of article XVIII. He would only go so far as to say that such statute was "in the nature of such limitations."

Fifth, Judge Marshall's statement that section 4 of article XVIII does not confer upon municipalities the right to prescribe rates and charges for utility services and products is entirely untenable. In considering this matter it is helpful to remember that section 3 of article XVIII confers upon municipalities all powers of local self-government which includes the power to operate public utilities for the benefit of the inhabitants of the municipality.³⁴ To be absolutely sure that municipalities would be able to operate public utilities free from the control of the state legislature, the drafters of article XVIII granted additional authority to municipalities in sections 4, 6 and 12 of article XVIII to acquire and operate utilities.

Even a cursory perusal of sections 4 and 6 of article XVIII clearly reveals the fact that those sections confer upon municipalities the power to establish rates and charges for utility services and products. All the supreme court decisions dealing with the operation of municipal public utilities recognize this fact except *Roettinger* and the two cases that echo that decision. Any other interpretation of section 4 of article XVIII renders the four sections of article XVIII dealing with municipal ownership and operation of public utilities meaningless because if municipalities do not have constitutional power to prescribe rates and charges for municipal public utility services and products, there is no effective constitutional grant of power to municipalities to acquire and operate such utilities. As stated in *Weiler* and other decisions cited previously herein, section 4 confers upon municipalities the power to do all things necessary for the acquisition and operation of a public utility and no one can contend that fixing rates and charges to be collected for services rendered and products sold is not absolutely essential to the acquisition and operation of every public utility.

The only logical and proper approach to the question presented in *Roettinger* is to first recognize, as the supreme court has in practically all of the other decisions dealing with municipal utilities, that section 4 of article XVIII confers upon municipalities the right to establish rates and charges for public utility services and products; and then proceed to a determination of whether the constitution authorizes the legislature to limit or curtail this constitutional grant of authority. If this proper approach is utilized then, paraphrasing Judge Marshall's language, it can be appropriately said that if the people had intended to give the state legislature the authority to limit a

³⁴ *McCann v. Defiance*, 167 Ohio St. 313, 148 N.E.2d 221 (1958); *supra* note 11.

municipality's power to prescribe public utility rates they would have said so in section 13 when they gave the legislature the authority to limit a municipality's power to levy taxes and assessments and incur debts.

The last statement of Judge Marshall that cannot go unchallenged is "that to give municipalities full control of rates and charges of a public utility, municipally owned, would cause all limitations upon taxation to become utterly meaningless and futile." As previously pointed out, excessive utility charges by municipalities imposed upon consumers which the municipality has a duty to serve can be enjoined by judicial proceeding. But even irrespective of this, section 13 of article XVIII and section 6 of article XIII do not empower the state legislature to limit or curtail the authority of a municipality to prescribe utility rates for municipally owned utilities but only empowers that body to limit municipal taxes and assessments. A charge for public utility services is not a tax, irrespective of what the supreme court has said. The supreme court by its *ipse dixit* cannot convert such charges into taxes any more than it can convert anything else into what it is not by a mere *ipse dixit*. In effect what the supreme court did in *Roettinger* was to rewrite the constitution so as to carry out the desires of the court rather than the people who adopted it. If applying the provisions of article XVIII as adopted by the people produces undesirable results, the remedy is not judicial amendment of the constitution.

In spite of the obvious inconsistencies of the thesis upon which it is based with other pronouncements of the supreme court, *Roettinger*, nevertheless, upholds the right of the General Assembly to prohibit the use of public utility revenues for general municipal purposes on the grounds such legislation is a proper limitation upon the power of a municipality to levy taxes and is the law in this state.

CONCLUSION

Overall, the supreme court decisions dealing with the power of municipalities to acquire and operate public utilities under the provisions of article XVIII have fairly and properly applied the pertinent provisions of the constitution except with respect to the use of surplus utility revenues. The constitutional provisions as adopted by the people were intended to and do give municipalities the right to operate public utilities without let or hindrance of the General Assembly and the courts have so construed these provisions. Whether it is wise to limit or prohibit state interference with municipal public utility operations is, of course, a political rather than a legal question. One thing, however, seems certain in this day and age of gigantic federal govern-

ment and huge state governments, the individual has less and less to say with respect to federal and state questions. It is only at the local level that the individual has much hope of presenting his views and opinions in governmental matters. If one adopts the philosophy that government should be kept as close to the people as possible, it certainly is entirely proper that municipally owned public utility operations should be governed by the municipality, and not the state legislature, for only in this way will the voice of the individual, as a practical matter, ever be heard or have any affect upon the operation of municipally owned utilities.